

CC:IT&A:Br4  
GMWinkler

AUG 15 1991

Director, Office of Examination Automation EX:A

Assistant Chief Counsel (Income Tax and Accounting) CC:IT&A

Delinquency Penalty/Employee FICA Tax on Tips

The purpose of this memorandum is to follow-up a telephone conversation between Mrs. Gail Winkler of my staff and Ms. Georgia Quinter in the Southwest Regional Office, Dallas, on August 14, 1991, concerning whether, in calculating the delinquency penalty for late filed individual income tax returns, the tax required to be shown on the return includes the FICA tax on tips. Ms. Quinter has indicated that some of the service centers are including the FICA tax in the computation of the delinquency penalty while others are not.

In relevant part, section 6651(a)(1) of the Internal Revenue Code states that in the case of failure to file any return required under authority of subchapter A of chapter 61 (except part III thereof) on the date prescribed (determined with regard to extensions), there shall be added to the amount required to be shown as tax on the return 5 percent per month of the amount required, not to exceed 25 percent, unless the taxpayer shows a reasonable cause for the failure.

Section 6011 of the Code, which is the general requirement for a return, is contained in part II of subchapter A of chapter 61. Section 6011 provides, in general, that when required by regulations prescribed by the Secretary, any person made liable for any tax imposed by this title shall make a return according to the forms and regulations prescribed by the Secretary. The term "tax imposed by this title" refers to all taxes in the Internal Revenue Code, including employment taxes as well as income tax.

Section 31.6011(a)-1(d) of the Employment Tax regulations provides that if an employee during a calendar year is paid wages in the form of tips which are subject to tax under section 3101 (i.e., employee FICA tax) and any portion of such tax cannot be collected by the employer from other wages of such employee or from funds turned over by the employee to the employer, the employee shall make a return for the calendar

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year in respect of the employee tax not collected by the employer. With certain exceptions for residents of Puerto Rico, Virgin Islands, etc., the return shall be made on Form 1040.

Thus, the uncollected employee FICA tax on tips is a tax required to be shown on an individual income tax return, Form 1040, and, as such, should be included in the calculation of the delinquency penalty (absent reasonable cause).

Should you have any questions concerning this matter, please do not hesitate to contact Mrs. Winkler. She may be reached at FTS 566-4442.

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By (signed) Rudolf M. Planert  
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